

Paper No. 12
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sovex Foods, Inc.

Serial No. 75/090,114

Donald A. Kaul and Stephen G. Janoski of Dorsey & Whitney
LLP for applicant.

Jennifer D. Richard, Trademark Examining Attorney, Law
Office 101 (Christopher Wells, Acting Managing Attorney).

Before Rice, Cissel, and Hohein, Administrative Trademark
Judges.

Opinion by Rice, Administrative Trademark Judge:

An intent-to-use application has been filed by Sovex
Foods, Inc. to register the mark RICE MOO (RICE disclaimed)
for "non-dairy, rice based powdered food beverage mix used
as a milk alternative."¹

¹ Application Serial No. 75/090,114, filed March 29, 1996 under
the provisions of Section 1(b) of the Trademark Act of 1946, 15
U.S.C. §1051(b), based on applicant's assertion of a bona fide
intention to use the mark in commerce. The identification of
goods originally read: "non-dairy, vegetable based food beverage
used as a milk alternative." However, in its response, filed May

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its specified goods, so resembles the mark SOY MOO (SOY disclaimed), registered for "vegetable based milk substitute made from soy beans,"² as to be likely to cause confusion, or to cause mistake, or to deceive. Applicant has appealed.

In support of the refusal to register, the Examining Attorney has made of record photographs of certain shelves in the non-refrigerated area of a grocery store, showing that soy and rice based milk substitutes or alternatives in both powdered and liquid form, including applicant's RICE MOO rice based powdered food beverage, are displayed on adjacent shelves, with applicant's product being displayed directly above, inter alia, two liquid non-dairy drinks offered by a single manufacturer under the marks SOY SUPREME and RICE SUPREME.

Applicant relies on certain third-party applications and registrations. In addition, applicant has submitted the declaration of Micheal K. Ahlfeld, Vice President,

9, 1997, to the first Office action, applicant amended its identification to read as indicated above. On July 31, 1997, applicant filed an amendment to allege use asserting first use of its mark, and first use of the mark in interstate commerce, on May 13, 1996.

² Registration No. 1,131,436 issued February 26, 1980; affidavit Sec. 8 accepted; affidavit Sec. 9 received.

Secretary, and Treasurer of applicant. Mr. Ahlfeld states that applicant adopted the mark RICE MOO on May 13, 1996; that applicant has used the mark continuously and very extensively since that date; that sales of applicant's RICE MOO products exceeded \$189,000 for the period between May 13, 1996 and July 29, 1997 (the date of the declaration); that applicant has promoted its mark extensively, particularly through print media; that applicant does not segregate its advertising and promotional expenditures among its product lines, but advertising expenditures for applicant's entire product line, including the RICE MOO products, were in excess of \$447,000 for the May 13, 1996-July 29, 1997 period; that applicant's RICE MOO products and registrant's SOY MOO products are clearly not identical, nor are they sold or marketed together in any manner which may potentially lead to possible purchaser mistake or confusion; that the main ingredient of applicant's RICE MOO products is brown rice; that they contain no soy; that the term MOO is in common use in the food industry; that during the time that applicant has been using the mark RICE MOO, it has never encountered any instance of any confusion between the marks RICE MOO and SOY MOO, or any instance in which someone indicated a belief that applicant and registrant were related,

connected, affiliated, or otherwise associated; and that there is no reasonable likelihood of confusion in this case.

Turning first to the goods, applicant contends that they differ in that applicant's RICE MOO products are rice based while registrant's SOY MOO product is soy based. It appears that applicant also takes the position that registrant's product is sold in liquid form from refrigerated store shelving, while applicant's product is sold in powdered form from store shelves in the non-refrigerated area.

It is well settled that the issue of likelihood of confusion in a proceeding such as this must be determined on the basis of the identification of goods set forth in the application and in the cited registration. See, for example, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In the present case, applicant's identification specifies that its goods are rice based and in powdered form, and registrant's identification specifies that its goods are vegetable based and made from soy beans. However,

registrant's identification contains no limitation as to form or as to the need for refrigeration. Under the circumstances, we must presume for purposes herein that registrant's SOY MOO vegetable based milk substitute made from soy beans is available in both liquid and powdered, and both refrigerated and non-refrigerated, form, and thus that applicant's and registrant's respective products may be displayed on grocery store shelves in close proximity to each other.

It is true that the involved goods of applicant and registrant, as described in their respective identifications, specifically differ in that one is rice based and the other is soy based. However, the issue to be determined under Section 2(d) of the Act is not whether the goods are likely to be confused, but rather whether purchasers are likely to be confused as to the source of the goods. For this reason, it is not necessary that the goods be similar or even competitive in order to support a finding of likelihood of confusion. It is sufficient for the purpose that the goods are related in some manner, and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that could, because of the marks used thereon, give rise to the mistaken belief that

they originate from or are in some way associated with the same source. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). Here, we have no doubt that the goods of applicant and registrant, as identified in the application and registration, are so closely related in nature that their contemporaneous marketing under the same or similar marks would be likely to cause confusion as to source.

Turning then to the marks, applicant has submitted copies of four third-party registrations³ and three third-party intent-to-use applications⁴ for marks that include the term MOO for dairy or dairy substitute products.⁵ According to applicant, the third-party registrations "support the irrefutable fact that the word MOO is in wide use in the food and beverages industry as a suggestive or highly suggestive identifier of 'dairy and dairy substitute

³ The registrations cover the mark NEW MOO for non-dairy, grain based food beverage used as a milk substitute; MOO MILK (MILK disclaimed) for milk; MOO-MANIA for flavored milk based food beverages and mix for same; and CLUB MOO and cow design for dairy-based food beverage consisting of yogurt and fruit juice.

⁴ The third-party applications cover the marks MOO KOOLER ORANGESLIDE for orange flavored milk; FROSTY MOO for flavored milk; and POWER MOO for milk-based beverages (application abandoned). These applications constitute evidence only of the fact that they were filed. As such, they have little probative value herein.

⁵ Applicant also submitted copies of a number of third-party applications and registrations for marks containing the word CRUNCH for breakfast cereals. These applications and registrations for different marks and goods than those involved in this case have no real bearing on the issue before us.

products'" and also "demonstrate that the trademark significance attributable to the word MOO is clearly diluted" in connection with such products.⁶ It is essentially applicant's contention that SOY MOO is an inherently weak mark which is not entitled to a wide latitude of protection, and that the mere presence in the two marks here of the common, highly suggestive word MOO is an insufficient basis on which to find a likelihood of confusion.

The four third-party registrations are insufficient to show that the term MOO is highly suggestive, commonly used, and/or diluted as a trademark for non-dairy milk substitute or alternative products. We note in this regard that the registrations are not competent to establish, in and of themselves, that the marks shown therein are in use, or that purchasers are familiar with them. See *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). While Mr. Ahlfeld has stated in his declaration that the term MOO is in common use in the food industry, his broad conclusory statement is unsupported by any specifics as to particular marks and goods, and/or by examples thereof such as labels or advertisements. For all we know, Mr. Ahlfeld's statement may be based on the

⁶ Applicant's appeal brief, pages 3 and 6.

existence of the third-party registrations made of record by applicant. We therefore find Mr. Ahlfeld's declaration inadequate to establish that the term MOO is commonly used and/or diluted as a trademark for non-dairy milk substitute or alternative products.

Nor do we find persuasive applicant's argument that the term MOO is highly suggestive, and thus very weak in trademark significance, when used in connection with non-dairy milk substitute or alternative products. A term is considered suggestive if, when the goods or services in question are encountered bearing the term, the potential purchaser must use thought, imagination, perception, and/or a multi-stage reasoning process to reach a conclusion as to the nature thereof. See *In re Mayer Beaton Corp.*, 223 USPQ 1347 (TTAB 1984), and *In re Tennis in the Round Inc.*, 199 USPQ 496 (TTAB 1978). Here, we have no doubt that the potential purchaser who encounters the term MOO used in connection with non-dairy milk substitute or alternative products must exercise imagination, thought, perception, and a multi-stage reasoning process to reach a conclusion concerning a characteristic of the goods. As noted by the Examining Attorney, at page 5 of her brief:

MOO evokes thoughts of cows, because it is the sound a cow makes. The goods, however, have nothing to do with the sound a cow makes. Indeed,

the goods do not even come from cows, but instead are alternatives to dairy milk. This incongruity about the term MOO when considered in the context of the goods requires the use of imagination and a multi-step reasoning process to determine what characteristics the mark indicates.

Because of the incongruity involved in the term MOO as applied to non-dairy milk substitute or alternative products, we conclude that it is suggestive, not highly suggestive, when used in registrant's mark SOY MOO. As such, it is a strong mark entitled to protection against the registration of confusingly similar marks. See *Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747 (TTAB 1986), and *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985).

Comparing applicant's mark RICE MOO with registrant's mark SOY MOO, there are, of course, specific differences between them in sound and appearance because of their differing first words. Nevertheless, these marks are very similar due to the fact that they (unlike any of the marks in the third-party registrations made of record by applicant) are similarly constructed. In each case the term MOO, which is quite memorable and sets the tone for the commercial impression created by the mark, is modified by a descriptive term which names a primary ingredient of the goods to which the mark is applied. Considering the similarity between the marks, combined with the strength of

registrant's mark, the closely related nature of the goods, and their similar channels of trade and classes of purchasers, we fully agree with the Examining Attorney's conclusion (at page 4 of her brief) that "consumers are likely to view the applicant's and registrant's marks as indicating a single source for the goods and to ascribe the differences in the marks to the different ingredients of the goods, rather than the differences in the sources of the goods." Under the circumstances, we conclude that there is, in this case, a likelihood of confusion. Cf. *In re Carnation Co.*, 196 USPQ 716 (TTAB 1977).

The fact that applicant has not encountered any instances of actual confusion arising from the contemporaneous use of the marks is not persuasive of a different result. Although applicant has given us information concerning the extent of its use, we do not have any information concerning the nature and extent of registrant's use, and thus we cannot tell whether there has been sufficient opportunity for confusion to occur if it were going to. We also note, in this regard, that applicant's mark had only been in use for a little more than a year at the time of Mr. Ahlfeld's declaration, and that there has been no opportunity herein for registrant to be heard from as to whether it has experienced any

instances of actual confusion. These factors materially reduce the probative value of applicant's declaration evidence on the matter of actual confusion. Moreover, the test under Section 2(d) of the Act is likelihood of confusion, not actual confusion.

For the foregoing reasons, we find that the refusal to register is well taken.

Decision: The refusal to register is affirmed.

J. E. Rice

R. F. Cissel

G. D. Hohein
Administrative Trademark
Judges, Trademark Trial
And Appeal Board

Ser. No. 75/090,114